No. 85-969

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LAWRENCE E. GRAY, EDWARD J. MURTY, JR. and PETER McC. GIESEY,
Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,
An Agency of the U.S. Government,
Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JOHN H. QUINN, JR.
(Counsel of Record)
QUINN, RACUSIN & RUTTENBERG
Chartered
Suite 700
1730 K Street, N.W.
Washington, D.C. 20006
(202) 429-9300
Attorneys for Amicus Curiae Federal Administrative Law Judges Conference

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to resolve a serious conflict among the circuits regarding whether the Civil Service Reform Act of 1978 (CSRA) bars suits by federal employees, and particularly by administrative law judges, under Section 701 *et seq.* of the Administrative Procedure Act alleging arbitrary and capricious agency personnel action.

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This amicus brief is submitted by the Federal Administrative Law Judges Conference (FALJC) in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari notes two reasons for granting certiorari in this case:

> 1. A direct conflict between the decision of the First Circuit in *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984) and the decision of the D.C.

Circuit in *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983), and its progeny in other circuits,[1] as well as the decision of the D.C. Circuit in this case.

2. The need for this Court to preserve the unique status of federal administrative law judges and their access to the courts to redress arbitrary and capricious agency action directed against them.

Either of these grounds justifies review; but the historic role of this Court in assuring the efficacy of the independent administrative judiciary is of particular concern to FALJC.[2] FALJC files this *amicus* brief to encourage the Court to issue a writ of certiorari to assure the continued access of ALJs to the courts in order to preserve the independence and integrity of their adjudicative functions.

This case presents important issues concerning the access of administrative law judges to the courts to prevent arbitrary and capricious actions against them by the Office

[1]See *Pinar v. Dole*, 747 F.2d 899, 913 (4th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985); *Broadway v. Block*, 694 F.2d 979, 986 (5th Cir. 1982); *Braun v. United States*, 707 F.2d 922, 925-27 (6th Cir. 1983); *Schrachta v. Curtis*, 752 F.2d 1259, 1260 (7th Cir. 1985); *Carter v. Kurzejeski*, 706 F.2d 835, 840 (8th Cir. 1983); *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984); *Weatherford v. Dole*, 763 F.2d 392, 394 (10th Cir. 1985); *Hallock v. Moses*, 731 F.2d 754, 757-58 (11th Cir. 1984).

[2]FALJC is an organization of approximately 600 federal administrative law judges from virtually every federal administrative agency or department that employs administrative law judges. Under its constitution and by-laws, FALJC exists "to foster faithful, efficient, and effective performance of the functions assigned to Administrative Law Judges under the various statutes governing Federal administrative proceedings" and "to advance the professional standing, education and welfare of the Administrative Law Judges employed by the Government of the United States."

of Personnel Management (OPM) or the agencies in which they serve. See, *e.g.*, *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980); *Association of Administrative Law Judges v. Heckler*, 594 F.Supp. 1132 (D.D.C. 1984); *Gulan v. Heckler*, 583 F.Supp. 1010 (N.D. Ill. 1984); *Bono v. Social Security Administration*, C.A. No. 77-0819-CV-N (W.D. Mo., settled June 19, 1979), cited by *Nash v. Califano, supra*. Such access is essential in order to preserve the independence and integrity of the administrative law judge system established by the Administrative Procedure Act and heretofore protected by this Court and the federal judiciary in general. *Butz v. Economou*, 438 U.S. 478 (1978); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

The federal administrative judiciary derives its existence from the Administrative Procedure Act, which was designed to protect and insulate administrative law judges from the agencies for which they serve and to assure the fact and appearance of fair and independent decisionmaking in administrative hearings under that Act. This Court has oft recognized the importance of protecting that structure and the infant administrative judiciary within it. In *Butz v. Economou*, 438 U.S. 478, 513-14 (1978), the Court held:

> "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See §556(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before

him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, see, *e.g., Wong Yang Sung v. McGrath,* 339 U.S. 33, 36-41 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v. Federal Trial Examiners Conference,* 345 U.S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. §3105 (1976 ed.). When conducting a hearing under §5 of the APA, 5 U.S.C. §554 (1976 ed.), a hearing examiner is not responsible to or subject to the supervision or direction of employees or agents engaged in the performance of investigative or posecution functions for the agency. 5 U.S.C. §554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. §554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. §3105. They may be removed only for good cause established and

determined by the Civil Service Commission after a hearing on the record. §7521. Their pay is also controlled by the Civil Service Commission.

> "In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review."

In *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248, 250 (1980), the Supreme Court noted that "the administrative law judge . . . performs the function of adjudicating child labor violations" and that "it is the judge whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."

The decision below threatens the viability of that structure by subjecting ALJs to unreviewable agency action. We submit that Congress did not intend such a result and that such a result should not be permitted in the absence of clear Congressional intent in the CSRA. Such clear Congressional intent cannot be shown and does not exist.

We will not repeat the legal arguments of the petitioners' brief, except to note that despite all of the Court of Appeals decisions on the question of whether the Civil Service Reform Act bars access to the Courts, only two cases — *Dugan* and the instant case — have confronted the question of whether the CSRA bars such access by

administrative law judges; and in those cases the courts came to diametrically opposite conclusions. In *Dugan* the court permitted a prospective ALJ to obtain judicial review of arbitrary and capricious agency action denying his application. In this case below the Court of Appeals for the District of Columbia Circuit denied access to the courts to sitting ALJs, while noting that such access was "plainly a laudable policy goal." (App. at 14a.) The Court of Appeals below stated that it could find no way to reach that result under the CSRA. We submit that the CSRA does not preclude such relief, and that this Court should intercede to afford such access to ALJs.

Recent events clearly demonstrate the continued need for this Court's protection of the administrative judiciary. In *Nash v. Califano,* 613 F.2d 10, 16-17 (2d Cir. 1980), the Second Circuit affirmed the standing of, and at the same time demonstrated the need for, an administrative law judge to be able to sue to protect his decisional independence from agency encroachment:

> "The APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decision-making. Since the independence is expressed in terms of such personal rights as compensation, tenure and freedom from performance evaluations and extraordinary review, we cannot say that ALJs are so disinterested as to lack even standing to safeguard their own independence. . . .
>
> "The scrutiny and affirmative direction alleged by Nash reaches virtually every aspect of an

> ALJ's daily role. Under the Quality Assurance System and the Peer Review Program, the number of reversals, the number of dispositions, and the manner of trying and deciding each case are recorded and measured against prescribed standards. ALJ Nash and his colleagues allegedly receive mandatory, unlawful instructions regarding every detail of their judicial role. Nash, therefore, has 'the personal stake and interest that impart the concrete adverseness required by Article III.' . . .
>
> "The second branch of the *Data Processing* test — the zone of interest requirement — is amply satisfied by the legislative protection for the ALJs' decisional independence, set forth above. The express prohibitions of performance evaluations and substantive review contained in 5 U.S.C. §4301, and appellant's position description promulgated by the Bureau of Hearings and Appeals, give his injury the required direct impact upon statutorily created rights. These provisions coupled with the direct, allegedly improper issuance of instructions to Nash and his fellow ALJs, make this 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment,' if the allegations are true."

In *Association of Administrative Law Judges, Inc. v. Heckler,* 594 F.Supp. 1132 (D.D.C. 1984), the District Court noted the importance of such litigation to the preservation of the ALJ's independence:

> "In sum, the ALJ's right to decision independence is qualified.

"The sole issue in this case is whether that qualified right has been violated by the now discontinued individual ALJ portion of the Bellmon Review Program, which targeted individual ALJs initially on the basis of their allowance rates and then on the basis of their own motion rates. Although the evidence at trial did not suggest that defendants intend to resume the practice of targeting high allowance ALJs for Bellmon Review, and although targeted review based upon own motion rate and grant-review rate of individual ALJs is no longer in effect, defendants have advised the ALJ corps of the possibility that Bellmon Review could be resumed. . . .

"At the same time, perhaps in response to this litigation, defendants have modified the Bellmon Review Program significantly for the better. The worthiness of defendants' stated goal of improving the quality and accuracy of decisions notwithstanding, targeting high allowance ALJs for review, counseling and possible disciplinary action was of dubious legality for at least two reasons. First, that practice was not consistent with the language of the Bellmon Amendment nor its sparse legislative history. Neither directed SSA to fucus on allowance decisions or target for review only ALJs with high allowance rates. In his introductory remarks, Senator Bellmon did state that SSA was to review the allowance decisions of those ALJs with high allowance rates but those remarks were not incorporated into the law. *See* Staff of Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess., *The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program,* 9

(Comm. Print 1983) (Senate Comm. Print). Second, high allowance ALJs were initially targeted for review without regard to their actual own motion rates in an overboard sweep.

"The practice of targeting ALJs on the basis of own motion rates, once that data became available, did reflect defendants' stated goal of improving the quality and accuracy of ALJ decisions. However, the evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have intruded upon the factfinding process and may have influenced some outcomes. . . .

"In sum, the Court concludes, that defendants' unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants' insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as 'targeting,' 'goals' and 'behavior modification' could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide. However, defendants appear to have shifted their focus, obviating the need for any

injunctive relief of restructuring of the agency at this time."

Finally, in *Gulan v. Heckler,* 583 F.Supp. 1010, 017-18 (N.D. Ill. 1984), the District Court highlighted the nature of pressures upon ALJs which mandate access to judicial redress:

> "The ALJ's performance falls far short of the level of objective and fair justice that judges in the United States are expected to achieve. The reasons for these apparently frequent injudicial performances by HEW Administrative Law Judges are not clear although there have been suggestions that they are the result of pressures brought to bear on them by executives in the department for political and fiscal reasons.[6] If this is the case, it should stop. There is no room in our system of justice of Nazi or Soviet-type misuse and abuse of judges and no ALJ should be exposed or succumb to such pressure.

"[6]See, *e.g., Benefit Rulings Criticized,* Chi. Trib. at 6, col. 3 (Sept. 26, 1983) (the SSA is subtly intimidating judges by ordering reviews and increased caseloads unless they had a record of upholding disability payment cutoffs); *Disability-Benefit Cases Flood Courts,* Nat'l L.J. at 1 (October 17, 1983) (reporting a suit by federal administrative law judges in the State of Washington charging the SSA with pressuring law judges to reduce the number of times they reverse agency determinations and award benefits to claimants). One United States Senator notes that administrative law judges are voicing concerns about pressure being placed upon them by SSA officials and that Congress has received complaints that agencies are establishing quotas on ALJs, as well as reviewing their reversal rates of

> agency decisions. Legislation is now pending before Congress to create an independent administrative judge corps, S. 1275. Heflin, *Query: Should federal administrative law judges be independent of their agencies?,* 67 Judicature 369, 412, 413 (March 1984), *reprinted in* Chi. Daily L. Bull. at 3, col. 2 (April 2, 1984)."

Administrative law judges derive their existence and independence only from the Administrative Procedure Act and the protections ensured therein by access to the courts. They administer justice in tens of thousands of cases each year;[3] but they have no political constituency and are necessarily insulated within (and hence somewhat alienated from) the agencies in which they serve. Since ALJs exist to protect the public from overreaching by agency staff in the hearing process, they cannot depend upon vindication of their rights by the agencies alone without judicial review.[4] They do not enjoy the constitutional protections enjoyed by Article III courts. If they lack access to the courts, they are subject to direct as well as subtle intimidations and abuse by OPM and their own agencies. These facts are known to Congress;[5] and it should not be

[3]Federal Administrative Law Judge Hearings, Statistical Report for 1976-78 (Administrative Conference of the United States July 1980).

[4]See cases quoted above.

[5]See, *e.g.,* Rosenblum, "The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles," Subcommittee on Social Security of the House Committee on Ways and Means, 94th Congress, 1st Session, Recent Studies Relevant to the Disability Hearings and Appeals Crisis, pp. 171-245 (Comm. Print December 20, 1975); "Study on Federal Regulation," Senate Committee on Governmental Affairs, Volume IV, Delay in the Regulatory Process (Comm. Print July 1977), pp. 105-112. See also Social Security Administration Law Judges, Survey and Issue Paper, Subcommittee on Social Security of the House Committee on Ways and Means, 96th Congress, 1st Session (Comm. Print 1979); "The Role of the Administrative Law

assumed to have foreclosed the judges' access to the courts in the absence of the clearest Congressional statement to that effect.[6] No such statement exists.

CONCLUSION

Accordingly, FALJC requests that the Court issue a writ of certiorari as requested by the petitioners in this case.

Respectfully submitted,

JOHN H. QUINN, JR.
(Counsel of Record)
QUINN, RACUSIN & RUTTENBERG
Chartered
Suite 700
1730 K Street, N.W.
Washington, D.C. 20006
(202) 429-9300
Attorneys for Amicus Curiae
Federal Administrative Law Judges
Conference

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Judge in the Title II Social Security Disability Program," Report by the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 98th Congress, 1st Session (Comm. Print 1983).

[6]See 5 U.S.C. §559: "Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly." See also *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967); *Shaughnessy v. Pedreiro,* 349 U.S. 48, 51 (1955); *Rusk v. Cort,* 369 U.S. 367, 379-80 (1962); H. Rep. 1980, 79th Cong., 2d Sess., 41 (1946); Attorney General's Manual on the Administrative Procedure Act, p. 139 (1947).